HAMDAN ABDUL HAMID A

v.

KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR B
LAU BEE LAN J
[CIVIL APPEAL NO: R1-14-04-04]
2 NOVEMBER 2009

REVENUE LAW: *Real property gains tax - Assessment - Singaporean citizen transferring to his daughter 1/4 share in his property in Malaysia by way of gift - Whether disposal liable to tax under para. 12 sch. 2 of Real Property Gains Tax Act 1976 - Whether tax exemption arose* C

The appellant was a Singaporean citizen who owned a piece of immovable property in Johor ("the said property"). The property D was purchased before 1 January 1970 and the market value of 1/4 share of the property as at 1 January 1970 was RM4,000. On 2 April 1997, the appellant disposed 1/4 share in the property to his daughter on consideration of love and affection. The respondent *vide* a notice of assessment for the year 1997 dated 17 July 1999 E imposed capital gains tax amounting to RM16,335 (including penalties) upon the said disposal. The appellant disputed this assessment. The issue arising was whether the appellant was liable to tax under the Real Property Gains Tax Act 1976, Act 169 ("the RPGT Act"). The Special Commissioners of Income Tax ("SCIT") F confirmed the assessment made by the respondent. Upon the appellant's request, the SCIT stated a case for the opinion of the High Court pursuant to para. 34 sch. 5 of the Income Tax Act 1967 ("the Act"). The respondent contended that the SCIT had not erred in holding that disposal of the property was liable to tax under para. 12 sch. 2 of the RPGT Act. G

Held (dismissing the appeal with costs):

(1) The "tax exemption" in para. 12 sch. 2 can only arise if the asset disposed of by way of a gift: (i) where the donor and recipient are husband and wife, parent and child or grandparent H and grandchild; and (ii) the gift is made within five years after the date of acquisition of the asset by the donor. Therefore any disposal of asset by way of a gift beyond the five years after the date of acquisition of the asset by the donor attracts RPGT and according to s. 4 of the RPGT Act, the rate of tax is as I specified in sch. 5 which provides for the each category of disposal. (para 13)

(2) With respect to the gift of relief, it is not on imposing tax, where if there is doubt, it should be construed in favour of the taxpayer, but it should be construed in favour of the Crown. The principle that in case of ambiguity a taxing statute should be construed in favour of a taxpayer does not apply to a provision giving a taxpayer relief in certain cases from a section clearly imposing liability. (para 14)

Case(s) referred to:
Ben-Odeco Ltd v. Powlson (Inspector of Taxes) [1978] ST 460 ***(refd)***
Cape Brandy Syndicate v. IRC [1921] 12 TC 358 ***(refd)***
Chor Phaik Har v. Farlim Properties Sdn Bhd [1997] 4 CLJ 393 FC ***(refd)***
Liftman v. Barren [1951] 2 All ER 393 ***(refd)***
Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri [1994] 3 BLJ 265 HC ***(refd)***
Pakala Narayanaswami v. Emperor, AIR [1939] PC 47 ***(refd)***
Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***
UHG v. Director General of Inland Revenue [1974] 1 LNS 181 FC ***(refd)***

Legislation referred to:
Income Tax Act 1967, sch 5 para 34
Real Property Gains Tax Act 1976, s. 3(2), 4(1) sch 2 para 12, sch 5 part I, II, III

Other source(s) referred to:
Leo D Pointon, *Revenue Law in Singapore and Malaysia - Cases And Commentary*, 2nd edn, p 29

For the appellant - Pradeep Kumar Nandrajog; M/s Syarikat KL Rekhraj
For the respondent - Norhisham Ahmad SFC

Reported by Amutha Suppayah

JUDGMENT

Lau Bee Lan J:

Background

[1] This is an appeal by the appellant, Hamdan bin Abdul Hamid @ Hamid bin Abdul Rahman against a deciding order of the Special Commissioners of Income Tax ("SCIT") made on 22 April 2003. *Vide* the deciding order, the SCIT confirmed the assessment made by the respondent, Director General of Income Tax, and determined that the disposal of the property Lot No. 3212, Grant No. 19775, Mukim Bandar Maharani, Daerah Muar, Negeri Johor

(1/4 share) by the appellant is liable for assessment of real property gains tax (RPGT), the appeal of the appellant was dismissed and the notice of assessment dated 17 July 1999 imposing RPGT of RM16,335 as tax payable for the year of assessment 1997 is confirmed. Upon a request of the appellant the SCIT on 14 December 2004 stated a case ("case stated") for the opinion of the High Court pursuant to para. 34 sch. 5 of the Income Tax Act 1967 ("the Act"). On 30 March 2009, I had dismissed the appeal of the appellant with costs and hence this appeal.

[2] The question for the opinion of the High Court is whether on the facts as found by the SCIT, and contained in the case stated the deciding order of the SCIT made on 22 April 2003 was correct in law.

[3] The facts admitted as found by the SCIT as a result of the documentary evidence adduced before the SCIT are:

1) Perayu adalah warganegara Singapura yang memiliki hartanah No. Lot 3212, Grant 19775, Mukim Township Bandar Maharani, Daerah Muar, Negeri Johor ("hartanah tersebut");

2) Hartanah tersebut diperolehi sebelum 1.1.1970 dan nilai pasaran 1/4 bahagian pada 1.1.1970 adalah RM4,000.00;

3) Pada 2.4.1997, Perayu telah melupuskan 1/4 bahagian hartanah tersebut kepada anak perempuannya atas balasan kasih sayang (pemberian);

4) Responden melalui Notis Taksiran Tahun 1997 yang bertarikh 17.7.1999 telah mengenakan cukai keuntungan harta tanah yang berjumlah RM16,335.00 (termasuk penalti) ke atas pelupusan tersebut; dan

5) Perayu tidak berpuashati ke atas taksiran tersebut dan telah memfailkan Borang Q bertarikh 14.5.2000.

Issue

[4] Whether the appellant is liable to tax under the Real Property Gains Tax Act 1976, Act 169 ("the RPGT Act").

Appellant's Contention

[5] The learned counsel for the appellant submitted the SCIT has erred in law in deciding that the appellant is liable under the RPGT Act on the following grounds in that the SCIT:

A (i) having agreed that para. 12 sch. 2 of the RPGT Act on the disposal by way of a gift applies to the appellant failed to give the true and proper intention of the legislature when enacting the provision;

B (ii) applied the narrow literal approach in interpreting para. 12 sch. 2 of the RPGT Act instead of applying the broader purposive approach on Parliament's intention to exempt (I shall address this point on "exemption" later) any RPGT payable by way of gift disposal from a father to a daughter;

C (iii) failed to construe the proviso to para. 12 sch. 2 of the RPGT Act in favour of the appellant when the words contained were ambiguous and uncertain;

(iv) in holding that the disposal of gift by a non citizen father to a daughter fell under part. III sch. 5, being a subsidiary D legislation;

(v) failed to realize that the benefit/right and privilege on the exemption on disposal by way of gift was already accrued to the appellant and cannot be taken away;

E (vi) in holding that the appellant's property was classified as chargeable asset and is charged at rate of 30% on every ringgit on chargeable gain when in fact there was no gain as the appellant's property was disposed on the consideration of love and affection to his daughter;

F (vii) by imposing a tax under the subsidiary legislation on a person not identified will produce absurd and unjust result and does not promote the purpose and object of the true intention of Parliament.

G **Respondent's Contention**

[6] The SCIT has not erred in holding that disposal of the property by the appellant is liable to tax under para. 12 sch. 2 of the RPGT Act:

H (i) as the proviso of para. 12 sch. 2 of the RPGT Act does not apply to the appellant as he is neither a citizen nor a permanent resident;

(ii) whatever disposal by a foreigner is subject to part III of I sch. 5 of RPGT;

(iii) there is no ambiguity or doubt in sch. 5 and sch. 2 of the RPGT Act;

(iv) alternatively, if there is any ambiguity or doubt in sch. 5 and sch. 2 of the RPGT Act, the doubt (which is denied) is with regard to the gift of relief and it should be construed in favour of the Crown as it is not an imposing tax; and

(v) with respect to issue of fairness, the law must be followed as there is no equity in tax.

[7] The court has considered the written submissions of the appellant and the respondent (encl. 11 and 12 respectively) and the oral submissions and the court's findings are as follows.

Decision

[8] In *Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 BLJ 265 the Supreme Court approved and followed the principles enunciated in *Bairstow & Harrison (supra)* (at pp. 35 - 36) pertaining the duty of the court when hearing appeals from the SCIT:

> If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is obviously, erroneous in point of law. But without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the Court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination, Rightly understood, each phrase propounds the same test. For my part I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.

[9] The relevant provisions of the RPGT Act for purposes of this case stated are:

(i) Subsections 3(2) and 4(1) of the RPGT Act provides as follows:

> 3. (2) Subject to this Act, the tax shall be charged on every ringgit of the total amount of chargeable gains accruing to a chargeable person in a year of assessment in respect of each category of disposal of chargeable assets specified in Schedule 5

4. (1) The tax shall be charged at the appropriate rate specified in Schedule 5 in respect of each category of disposal stated therein.

(ii) Schedule 5:

Schedule 5
Part I

Except where Part II is applicable, the following rates of tax shall apply:

Category of disposal	Rates of tax
Disposal within two years after the date of acquisition of the chargeable asset	... 20 per cent
Disposal within third year after the date of acquisition of the chargeable asset	... 15 per cent
Disposal within fourth year after the date of acquisition of the chargeable asset	... 10 per cent
Disposal within fifth year after the date of acquisition of the chargeable asset	... 5 per cent
Disposal within sixth year after the date of acquisition of the chargeable asset or thereafter	... Nil

Part II

In the case where the disposer is a company, the following rates of tax shall apply:

Category of disposal	Rates of tax
Disposal within two years after the date of acquisition of the chargeable asset	... 20 per cent
Disposal within third year after the date of acquisition of the chargeable asset	... 15 per cent
Disposal within fourth year after the date of acquisition of the chargeable asset	... 10 per cent
Disposal within fifth year after the date of acquisition of the chargeable asset	... 5 per cent

Part III

> An individual who is not a citizen and not a permanent resident shall on disposal of a chargeable asset acquired by him be charged at the rate of 30 per cent on every ringgit of the chargeable gain on that disposal after 27 October 1995.

(iii) Paragraph 12 of sch. 2

> Where an asset is disposed of by way of a gift, the disposal shall be deemed to be a disposal at the market value of the asset:
>
> > Provided that, where the donor and recipient are husband and wife, parent and child or grandparent and grandchild, and the gift is made within five years after the date of acquisition of the asset by the donor, the donor shall be deemed to have received no gain and suffered no loss on the disposal and the recipient shall be deemed to have acquired the asset at an acquisition price equal to the acquisition price paid by the donor plus the permitted expenses incurred by the donor.

[10] At p. 13 of the case stated, after having noted the relevant provisions the SCIT summarily states:

(i) Section 4 of the RPGT Act provides that tax shall be charged at the rate as specified in sch. 5 of the RGPT Act;

(ii) Schedule 5 is divided into three categories. Part I is applicable to individual citizens and permanent residents; Part II is applicable to a company; whilst Part III is applicable to individuals who are not a citizen and not a permanent resident;

(iii) Paragraph 12 sch. 2 deals with an asset when it is disposed of by way of gift where the disposal value shall be deemed to be the market value; it provides that if the disposal of the asset is made by way of gift within a period of five years, the donor is deemed to have received no gain and suffered no loss, as a result of which there is no chargeable gain to be taxed under the RPGT Act. It is not an exemption.

[11] It is an admitted fact that the appellant is a Singaporean who acquired the said property in 1950 and 1/4 of the said property was by way of a gift to his daughter on 2 April 1997 which is more than five years after the date of acquisition. The SCIT stated "Thus we find that the disposal of the said property by way of gift by the appellant does fall within the purview of para. 12 (sch. 2) of the Act. There is therefore, a chargeable gain on the disposal of the said property. Having said that there is chargeable gain in this disposal, we now have to determine as to the rate of tax chargeable

in respect of the chargeable gain "(p. 14 of case stated) ... since the appellant had disposed of the asset after the period of five years from the date of acquisition, the value of the said asset would be the market value" (p. 13 of case stated). At p. 14 the SCIT stated:

> The Appellant had submitted that Part III Schedule 5 of the Act is silent on the issue of disposal by way of gift and that there is no words in Schedule 2 para 12 of the Act where parents are non-citizen from pending a property by way of gift. There is therefore a conflict between paragraph 12 Schedule 2 and Part III Schedule 5 of the Act. With due respect, we are not in accord with the submission of the Appellant.

At p. 17 the SCIT then stated:

> It is axiomatic that Section 3 provides for the chargeability of real property gains tax in respect of chargeable gain accruing on the disposal of any real property. And Section 4 of the Act provides for the rates of tax to be charged on the chargeable gain depending on the categories of disposals as envisaged in Schedule 5 and that there is no nexus and no ambiguity between paragraph 12 Schedule 2 and Part III Schedule 5 of the Act,

(See *U.H.G. v. Director General of Inland Revenue* [1974] 1 LNS 181; (FC), *Pakala Narayanaswami v. Emperor*, AIR [1939] PC 47 at p. 52, *Cape Brandy Syndicate v. IRC* [1921] 12 T.C. 358 at p. 366).

[12] From the above findings, I am in agreement with the reasoning of the SCIT that the provision of para. 12 sch. 2 applies to the appellant and in this regard the contention of the respondent that para. 12 sch. 2 is not applicable to the appellant is misconceived.

[13] The appellant contended that the SCIT has fallen into error in not adopting the purposive approach when interpreting the two provisions in order to arrive at a just decision citing *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265. The appellant also submitted that the SCIT had failed to consider the true intention and purpose of Parliament when introducing the proviso in para. 12 sch. 2 on exemption of RPGT in case of gift disposal from a father to a daughter even if the disposal is after five years since at that time any disposal of properties after five years were tax exempted and ought to refer to the Hansard as an aid to interpretation so as to arrive at a just decision citing *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1997] 4 CLJ 393.

(a) Even without reference to the Hansard, I am of the view that the "tax exemption" referred to by learned counsel for the appellant in para. 12 sch. 2 can only arise if the asset disposed of by way of a gift: A

(i) where the donor and recipient are husband and wife, parent and child or grandparent and grandchild; and B

(ii) the gift is made within five years after the date of acquisition of the asset by the donor.

(b) Reverting to the appellant's contention that *the Hansard* ought to be resorted to, with regret I find this argument cannot be sustained. The case of *Chor Phaik Har* (*supra*) where the Federal Court, *inter alia*, held that "In construing a statute, a reference to Parliamentary reports of proceedings or Hansard, as an aid to statutory interpretation, should be permitted where the enactment is ambiguous or obscure, or which if literally construed might lead to an absurdity" is not applicable here. In my view the SCIT has not erred when it held there is no doubt and ambiguity as to the language used in para. 12 sch. 2 and part III sch. 5 of the RPGT Act, the provisions have to be construed in their natural and ordinary sense following the cases cited in para. II above). C D E

(c) For argument sake, assuming that there is doubt and ambiguity in para. 12 sch. 2 and part III sch. 5 of the RPGT Act and the Hansard ought to be called in aid to statutory interpretation, the passage of the The Dewan Rakyat Parliamentary Debate Jilid 1 Bill 95-103 Nov-Dis 1987 (Hansard) relied on by the appellant is: F

> Di bawah perenggan 12, Jadual II kepada Akta, menyatakan bahawa pelupusan sesuatu aset dengan cara pemberian, disifatkan sebagai pelupusan mengikut nilai pasaran aset dan tertakluk kepada Cukai Keuntungan Harta Tanah. Bagaimanapun pemberian yang dibuat di antara suami dan isteri, bapa dan anak, dato' atau nenek dengan cucu adalah terkecuali daripada cukai keuntungan harta tanah, jika pemberiannya membuat pilihan supaya pelupusan itu dikira sebagai pelupusan yang tidak menerima apa-apa keuntungan atau menanggung apa-apa kerugian. G H

(d) Based on the aforesaid passage the appellant argued that the true intention of Parliament when introducing the proviso to para. 12 sch. 2 is to exclude liability of tax on disposal of property by way of gift from a father to a daughter irrespective I

of their citizenship and irrespective of the year the property is disposed, since there will be no gain and no loss to the said disposal.

(e) I find just as learned counsel for the appellant submitted in the aforesaid passage in the Hansard, there is no mention anywhere that the father (disposer) must be a citizen or that the disposal must be within five years, I agreed with learned revenue counsel's submission that neither is there mention that the proviso is applicable to a non-resident.

(f) Even without reference to the Hansard, upon a literal construction of the provision, I am of the view that the "tax exemption" referred to by learned counsel for the appellant in para. 12 sch. 2 can only arise if the asset disposed of by way of a gift:

(i) where the donor and recipient are husband and wife, parent and child or grandparent and grandchild; and

(ii) the gift is made within five years after the date of acquisition of the asset by the donor.

(g) By inference therefore any disposal of asset by way of a gift beyond the five years after the date of acquisition of the asset by the donor attracts RPGT and according to s. 4 of the RPGT Act, the rate of tax is as specified in sch. 5 which provides for the each category of disposal.

[14] In the event I err and there is doubt and ambiguity in construing para. 12 sch. 2 and Part III of sch. 5 of the RPGT Act, I am inclined to agree with the submission of learned revenue counsel that with respect to the gift of relief, it is not on imposing tax, where if there is doubt, it should be construed in favour of the taxpayer, but it should be construed in favour of the Crown. Support for this proposition is found at p. 29 of *Revenue Law in Singapore and Malaysia - Cases And Commentary* Second Edition by Leo D Pointon, wherein it is stated "where, however, a statute provides for the taxpayer to be exempted from taxation this will be strictly construed against him" and the learned author cited the case of *Liftman v. Barren* [1951] 2 All ER 393; 33 TC 373 (UK Court of Appeal) Cohen LJ (at p. 386): '... I agree ... that the principle that in case of ambiguity a taxing statute should be construed in favour of a taxpayer does not apply to a provision giving a taxpayer relief in certain cases from a section clearly imposing liability.

(a) Further support can be drawn from the case of *Ben-Odeco Ltd v. Powlson (Inspector of Taxes)* [1978] ST 460 at p. 471 the House of Lords (per Lord Russell of Killowen) "I start, my Lords, with the fact that this is a provision affording relief from tax. The taxpayer must persuade me that he is within it. If the reasons pro and con were in precise balance, the taxpayer on that basis would lose. But in upholding the view of the special commissioners and of Brightman J, as I do, I find the balance is in fact against the taxpayer company.

[15] For the reasons given I had dismissed the appeal of the appellant with costs.